



IN THE
Supreme Court of the United States

October Term 1979

No. 79-268

FRANK STEARNS GIESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF P.E.N. AMERICAN CENTER, AMERICAN
BOOKSELLERS ASSOCIATION, AND THE FREEDOM
TO READ FOUNDATION, *AMICI CURIAE*,
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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Interest of *Amici Curiae**

The *amici* are organizations of American authors, publishers, editors, booksellers and librarians who are devoted professionally, culturally and as a matter of principle to the First Amendment.

P.E.N. American Center, the United States chapter of International P.E.N., is a non-profit association of 1500 leading American poets, playwrights, essayists, novelists

* A letter of consent from the attorney for the petitioner has been filed with the clerk of the Court. The Solicitor General, the attorney for the respondent, has authorized us to state that he will file a letter of consent forthwith.

and translators. The charter of International P.E.N. stands for the principle of unhampered transmission of thought within each nation and among all nations. Members pledge themselves to oppose any form of suppression of freedom of expression in the country and community to which they belong.

The American Booksellers Association is a trade association incorporated in the State of New York and consisting of booksellers located in each of the fifty states of the United States. Its membership includes the largest chains of bookstores and the smallest independent booksellers, as well as book departments of department stores. At the present time its membership totals approximately 5,500 booksellers, accounting for more than eighty percent of the sales of books by general interest bookstores or book departments of department stores.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights and to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled.

Amici believe that the decision of the court of appeals majority in this case constitutes, as Circuit Judge Ely described the original majority opinion, "an impediment to the intellectual growth of our citizenry" (Pet. at A-94). In their view, review of this case and reversal of the decision below is required for the reasons succinctly stated by Circuit Judge Hufstедler in her dissenting opinion (Pet. at A-66):

Dr. Giese's conviction for conspiracy must be reversed because it was obtained by patently inadmissible evidence of the contents of the book *From the Movement Toward Revolution*, which the prosecutor forced Giese

to read to the jury after defense counsel's objection to the admission of the book had been overruled. The prosecutor used the contents of the book to convince the jury that the ideas expressed in the book were Giese's own and that he acted on those ideas to form a conspiracy to blow up recruiting centers. Giese was thus convicted of conspiracy by book association in egregious violation of the guarantees of the First Amendment.

Statement

The opinions below, jurisdiction of this Court, questions presented, and statement of the case are set forth in the petition (Pet. at 1-16). It is important to emphasize several salient points concerning the trial of Dr. Giese.

1. An integral part of the government's case-in-chief consisted of evidence that Giese recommended certain books and pamphlets to other alleged co-conspirators and that he participated in abstract political discussions which included discussion of such literature. As Judge Hufstедler noted in dissent (Pet. at A-70):

The Government pursued its book theme with the presentation of [Lynn] Meyer's testimony. Meyer first met Giese when Meyer was an inmate of the Oregon State Correctional Institute. Giese volunteered his services for lectures and for conducting discussion groups in the institute. Meyer testified that Giese volunteered to send prisoners liberal and radical literature. He said that Giese conducted a discussion group at the prison and that he "advocate[d] George Jackson's book "Blood in My Eye," which Meyer said, over objection, dealt with "urban warfare in American cities." Meyer testified that he requested and that he

later received literature from the Prison Support Group, an organization that was sponsored by the R.E.P. Bookstore, owned by Giese. When the prosecutor showed him a copy of "Revolution," Meyer identified the book as one of those that he had seen in various houses occupied by the alleged conspirators.

Meyer further testified "that Giese recommended radical books advocating violence during his lectures at the Oregon Correctional Institute" (Pet. at A-71).

2. Dr. Giese never testified about the kind of books he read. Rather, in an effort to rebut implications by the prosecutor that his bookstore carried how-to-do-it books and pamphlets about manufacturing bombs and explosives, he introduced eighteen books and pamphlets which he described as representative samples of the literature he carried in his bookstore. He testified that neither the book entitled *From the Movement Toward Revolution* nor the several "how-to-do-it" books introduced into evidence by the government were carried in his bookstore. The government introduced no evidence and did not attempt to contradict Dr. Giese's testimony on these matters.

3. The government's cross-examination of Dr. Giese on the contents of *From the Movement Toward Revolution* was neither intended nor used to impeach the non-existent testimony of Dr. Giese on the subject of which books he read. Rather as the prosecutor's closing argument to the jury made abundantly clear (Pet. at 10, 11), the government introduced and exploited such evidence in an effort to show that Dr. Giese shared the political opinions expressed in the book. The prosecutor explicitly asked the jury to infer that, on the basis of such opinions, Dr. Giese possessed the intent, motive and disposition to commit the crime alleged, and that in fact he did so.

The above points are the most flagrant examples of a trial that was infected with constitutional error from start to finish.

REASONS FOR GRANTING THE WRIT

I.

The Admission of Evidence That Petitioner Possessed, Read and Engaged in Discussions of Particular Books to Show His Alleged Criminal Intent, Purpose or Character Violated Petitioner's First Amendment Rights.

This case raises a question of transcendent importance under the First Amendment. Petitioner was tried, convicted and sentenced to five years in jail in major part because he exercised his fundamental rights to possess, read and discuss non-obscene literature. Petitioner's mere possession and casual private reading of portions of *From the Movement Toward Revolution* was used as critical evidence to convict him of conspiracy. In addition, the government introduced as direct evidence against the petitioner testimony that he had either given or recommended books and pamphlets which a government witness characterized as liberal or radical or as advocating "urban warfare in American cities" (Pet. at A-70).

The court of appeals decision affirming petitioner's conviction conflicts with an unbroken line of decisions by this Court holding that the right to possess books, to read them, and to discuss their contents lies at the core of the First Amendment. *Dennis v. United States*, 341 U.S. 494; *Yates v. United States*, 354 U.S. 298; *Stanley v. Georgia*, 394 U.S. 557. As the Court stated in *Stanley*:

If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in

his house, what books he may read or what films he may watch. Our whole institutional heritage rebels at the thought of giving government the power to control men's minds.

394 U.S. at 565.¹

Consequently, Dr. Giese's possession, reading, and discussion of various books constituted the exercise of First Amendment rights "in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235. Dr. Giese clearly could not have been indicted or convicted for his reading habits or recommendations, at least unless the government could show that in the course of his literary discussions Dr. Giese advocated and incited imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444; *Hess v. Indiana*, 414 U.S. 105. No such proof even was attempted.

The government's use of Dr. Giese's exercise of his right to read and discuss literature to establish his alleged participation in a conspiracy to engage in violence or a predisposition to do so is no more lawful than would have been a direct criminal prosecution for his exercise of such rights. Any substantial burden upon freedom of expression and thought violates the First Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233; *Speiser v. Randall*, 357 U.S. 513; *Lamont v. Postmaster General*, 381 U.S. 301; *Healy v. James*, 408 U.S. 169; *Bates v. State Bar of Arizona*, 433 U.S. 350.

Here the burden was direct, immediate, and substantial. It constituted nothing less than a crucial factor in the

¹ Earlier, this Court, in *Lamont v. Postmaster General*, 381 U.S. 301, struck down a federal statute which interfered, however obliquely, with the untrammelled right to receive so-called Communist propaganda from abroad. See also *Martin v. City of Struthers*, 319 U.S. 141, 143.

jury finding a verdict of guilty of conspiracy. The exercise of First Amendment rights was as effectively infringed as if there had been a direct criminal prosecution for possessing, reading or discussing certain books.

Use of evidence of reading habits and preferences, as was done in this case, is thus plainly a violation of the First Amendment. Any other rule of law would have a devastating impact upon the system of freedom of expression. It would mean that citizens would have to weigh with care and foresight what books they read, what books they keep in the house, what books they recommend to friends, and what ideas about books they express in public or in private. Otherwise they might find that their reading habits and preferences in literature are used against them in some later criminal or other official proceeding. Moreover, a prosecutor would be entitled, whenever it seemed advantageous, to delve into literary tastes, check library cards, and otherwise search for writings that express unorthodox or unpopular ideas and are connected in some way with an accused.

The impact upon freedom of expression would be particularly serious where the government seeks to utilize conspiracy doctrines to prosecute political dissidents. Cf., *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969). Numerous persons on the fringes of a political movement would find themselves drawn into the conspiratorial net and their fate determined by a jury's reaction to their bedtime reading. The result would be guilt by association carried to lengths without parallel in our history.

This is not a proper case for balancing the infringement upon First Amendment rights against the government's interest in introducing evidence of a defendant's reading preferences. See, e.g., *Edwards v. South Carolina*,

372 U.S. 229; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241. But even if a balancing test were invoked, the government cannot show any substantial reason, much less compelling reasons, for overriding First Amendment rights. The link between possessing and reading books and illegal action is remote, speculative and unprovable. The value of such evidence to the government, as the record in this case demonstrates, consists almost entirely in its potential for prejudicing the jury. On the other hand, the damage to freedom of expression is overwhelming.

II.

The Reasons Advanced by the Majority Opinion Below for Admitting the Book Evidence Are Wholly Without Merit.

The majority opinion in the court below disclaimed any intention to establish "a general rule that the government may use a person's reading habits, literary tastes, or political views as evidence against him in a criminal proceeding" (Pet. at A-26). Yet the majority opinion has precisely that effect. The reasons stated for upholding the admission of the evidence in this case cannot withstand reasoned analysis and reveal that the majority, having taken a highly technical position, missed the main point.

A. The court of appeals majority maintained that "the prosecution gained the right to cross-examine Giese on *From the Movement Toward Revolution's* contents when, on direct examination, Giese testified about the contents of a number of books and suggested they were indicative of his peaceable character" (Pet. at A-34). The court held that, by doing so, Giese had opened up the question of his character. The court of appeals rationale is contra-

dicted by the record and forbidden by the First Amendment.

The record reveals that the prosecutor never suggested to the trial court or the jury that his cross-examination based upon the contents of the book was intended merely to contradict petitioner's alleged character evidence and to impeach his credibility as a witness. Rather, the prosecutor unmistakably used the contents of the book to convince the jury that it should attribute the ideas in the book to the petitioner and that it should conclude that the petitioner acted upon those ideas to form the alleged conspiracy and to engage in the substantive offenses. In directing the jury's attention to *From the Movement Toward Revolution* the prosecutor stated (Pet. at 10, 11):

In California as regards Mr. Giese, we have *From the Movement Toward Revolution*, Mr. Giese has fingerprints on this particular book. He told you that he had one of these books himself, possibly, at home. He could not recall how or if at all his fingerprints got on this particular book which came out of the Debra Sue Apartments in California.

This is an architectural manual, basically, of urban warfare. Between this book and this book, you have the makings for any sort of urban warfare that you would like to participate in.

This is basically a conspiracy action, and I would like to just very briefly take excerpts from pages which contain Mr. Giese's fingerprints. "A revolutionist sees death as a national phenomenon, must be ready to kill to change conditions. Revolution is armed struggle, violence, war, bloodshed and the duty of a revolutionary is to make revolution.

"Let's all try to pick targets with more care and planning. The object is to destroy the economy like bombing sites which will affect the economy the most, rip off weapons and money, sniping attacks. Remember, in a revolution, one wins or dies. The stakes are very high.

"Do you recall the old words, 'Ask what you can do for your country,' destroy it, mentally, morally, psychologically and physically destroy it. And whatever you do do it good."

Now those are just two pages from this book but these are two pages which contain the fingerprints of Frank Giese. If you have an opportunity, you may want to leaf through the rest of the book, because, as I indicated, this tells you—this is another how to do it for urban warfare.

...

Did we make up Frank Giese's fingerprints on the book *From the Movement Toward Revolution*? . . . You read those pages where Frank Giese's fingerprints were. You read those pages. It talks about bombing, sniper attacks. You read that book. You read other pages throughout there. Look at Page 51, for instance, look at the preface. Throughout that book are references to the very thing that these people did.

Not only did the government urge its how-to-do-it theory upon the jury in the trial court, but it also argued it before the court of appeals. Indeed the court of appeals adopted the government's theory in its first opinion, which it later withdrew: "By introducing *From the Movement Toward Revolution* and having the appellant read from it, [and] . . . [i]n its closing argument to the jury, the pros-

ecutor drew a direct connection between the conspirator's acts and the book's discussion of bombing, sniper attacks, and war against the State" (Pet. at B-27). Despite its recognition of the prosecutor's purpose and effect, the court majority inexplicably held that "Appellant's First Amendment rights were not transgressed" (*Id.*).

It was only after Judge Hufstedler's strong dissenting opinion (Pet. at B-41), and the request of a judge of the court for an *en banc* review (Pet. at A-94) that the majority withdrew its first opinion. The majority now lamely states that "we are not establishing a general rule that the government may use a person's reading habits, literary taste or political views as evidence against him in a criminal prosecution" (Pet. at A-26). But the majority's new opinion cannot obliterate the realities—the government's purpose, the appellate court's recognition of its effect, and that court's initial approval of that purpose and effect.

Even if the purpose and effect of the prosecutor's actions merely had been to try to impeach Dr. Giese, his actions would have been improper. As Judge Hufstedler stated (Pet. at A-81):

The contents of the books that a person reads cannot be used as evidence of his peaceable or non-peaceable character. No inference of any kind can be drawn about a person's character from the kinds of books that he reads. We have no basis in human experience to assume that persons of "good" character confine their reading matter to "good" books, or that persons who read peaceful books are peaceful people, or that persons who read books involving violence are violent people.

The majority rationalized its holding by stating that the prosecutor's cross-examination had the effect of showing

"the sharp contrast between the kinds of books Giese said he read and the kinds he actually read" (Pet. at A-62, A-63, n.13). But Giese never testified about the kind of books he read, and thus there was no evidence to contradict. It is true that Giese introduced into evidence 18 books and pamphlets which he described as representative of the literature he carried in his bookstore. This evidence was introduced, however, not to show Dr. Giese's peaceable character, but rather to counter the prosecutor's improper suggestions that petitioner's bookstore carried mainly how-to-do-it manuals on guerilla warfare. The government made no effort to cross-examine Giese on the representativeness of the books he introduced into evidence or on his testimony that he did not carry the book *From the Movement Toward Revolution* in his bookstore.

In short, it is plain that it never occurred to the government, the trial court or anyone at the trial that the prosecutor's cross-examination of Giese on the contents of the book had anything to do with Giese's credibility as a witness. The rationale was invented by the court of appeals majority in an effort to make more palatable its prior decision upholding one of the most egregious First Amendment violations in a recent criminal trial. The reality remains that Dr. Giese was convicted in major part because he was forced to read, as if they were his own, the words of someone else, written at another time and another place, merely because at yet another time Dr. Giese may have read those very words in the privacy of his own home.

B. The court of appeals held that it was proper for the prosecuting attorney to introduce Meyer's testimony that Giese recommended certain books to him and engaged him in abstract political discussions:

because it provided the jury with information about [Giese's] relationship with many of the people who subsequently became his co-conspirators. Like the fingerprints in *From the Movement Toward Revolution*, Meyers' testimony shed light on the conspirator's association with each other. It also tended to show that Giese exercised a leadership role *vis-a-vis* the other conspirators. By conducting discussions on a topic of mutual interest—radical politics—and by furnishing or recommending books on that subject, Giese attracted Meyer (and perhaps his fellow-prisoners Severin and Wallace) to the group at the bookstore which eventually formed the conspiracy.

(Pet. at A-49, A-50).

Once again the court of appeal's majority utterly failed to consider petitioner's First Amendment rights. While it may have been relevant for the government to prove that Giese associated with Meyers, no valid prosecutorial interest was served by evidence of the content of their political or literary discussions. The intended impact and undoubted result of Meyers testimony was to place before the jury Giese's unpopular political views and his interest in unpopular literature expressing those views. The testimony had no relevance to any issue in the case. The fact that Giese may have discussed radical politics and radical literature simply may not be used as a basis for inferences that he engaged in a criminal conspiracy. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444; *Noto v. United States*, 367 U.S. 290.

C. The court of appeals majority recognized that the compulsory reading by Dr. Giese of lurid passages from *From the Movement Toward Revolution* on the necessity

for violence and revolution might have "hurt Dr. Giese's cause to some extent" (Pet. at A-46). The court nevertheless held that "the probative value of enabling the jury to observe his demeanor while he was being impeached outweighed the prejudicial effect" (*Id.*).

There is no support whatever for the view that any inferences may be drawn about a witnesses' veracity from the manner in which he reads out loud from a book. As Judge Hufstedler stated (Pet. at A-82):

The prosecutor's transparent purpose in requiring Giese to read the inflammatory passages of the book was to convey to the jury that the words of the author were the words of Giese. The prosecutor fully exploited that strategy in his argument to the jury.

Since it was impermissible to admit the contents of the book for any purpose in this case, the compulsory reading constituted a gross and egregious violation of petitioner's First Amendment rights.

CONCLUSION

The opinion of the court of appeals majority demonstrates one of the most serious disregards of First Amendment rights and values in recent times. The court allowed the government to use a person's reading habits to induce a jury to believe that he was acting out the contents of the books he read. It is difficult to imagine an opinion which would have a more devastating effect on the American public's exercise of its fundamental rights to free speech, freedom of the press and free association. The petition for writ of certiorari should be granted.

Respectfully submitted,

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